IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY & INTESTATE JURISDICTION

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NOTICE OF MOTION NO.122 OF 2006

IN

TESTAMENTARY SUIT NO.33 OF 2006

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Mr.Kaikhosrow Aspendiar Oshtori ...Petitioner

v/s.

Dr.Meherji Aspendiar Oshtori

and Anr. ...Caveators

...

Mr.Sanjay Jain i.b A.G.Revenkar & Co. for the Petitioner.

Mr.Sandip Parekh i/b Gordhandas & Fozdar for the Caveators.

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CORAM: D.K.DESHMUKH, J.

DATED: 15TH DECEMBER,2006

P.C.:

1. This Notice of Motion is taken out by the Petitioner for removal of caveats filed by the caveators. The Petitioner has filed the suit for grant of probate of the Will left behind by Mrs.Mahinbanoo A. Oshtori, who expired on 1st October, 2005. The Petitioner is named as executor in the Will. He is also the son of the deceased. Both the caveators are also sons of the deceased. In the Will, one of the caveators Dr.Meherji Aspendiar Oshtori is named as the co-exectuor of the Will.

2. According to the Petitioner, the caveats filed by the caveators are liable to be removed because in the affidavit filed in support of the caveats, the caveators nowhere challenge the validity and legality of the Will. On the contrary both the caveators have acted pursuant to the Will and have accepted the Will. The caveators have also filed reply in this Notice of Motion. They are opposing this Notice of Motion.

3. I have heard the learned counsel appearing for both sides. The purpose of filing the caveat in a probate petition is to challenge the validity of the Will. The consequence of filing of a caveat is that the caveator is added as a defendant and the probate petition is converted into testamentary suit. The affidavit filed in support of the caveats is treated as a written statement filed by the Defendant-caveator. Obviously, therefore, the affidavit filed in support of the caveat must give rise to an issue between the parties. In a probate petition the only issue that can be raised and that can be decided by the court is whether the Will of which the probate is sought is legal and valid Will. Therefore, it is absolutely necessary for maintaining the caveat in a probate petition to dispute the validity and legality of the Will in the affidavit filed in support of the caveat. In paragraph 4 of the affidavit filed in support of the caveat, the caveator says that the Will of which the probate is sought is invalid, illegal and fraudulently prepared and is not forcible in law. No where in the affidavit filed in support of the caveat, the caveator says that when the Will supposed to have been signed by the deceased testator, he was not in

right frame of mind to dispose of his property, that the testator has not signed the Will, that it is not attested as per law. Merely making a vague statement that the Will is invalid and illegal will not amount to challenging the validity of the Will. Perusal of paragraph (5) of the affidavit filed in support of the caveat, on the contrary, shows that both the caveators have acted pursuant to the Will. In paragraph (6), they have stated that after the Will was disclosed a meeting of the members of the family was held on 22-2-2005 and the memorandum of understanding was arrived at between the members of the family for implementation of the Will on 23-12-2005. Paragraph (6) of the affidavit read as under:-

> 6. I say that after due deliberation on the Will between the beneficiaries and executors/beneficiaries, the memorandum of understanding was arrived at and duly signed by all the present in presence of each other. A copy of which was given to each other of the above present.

4. It is, thus, clear from the affidavit filed in support of the caveat that not only the caveator did not dispute that the Will is duly signed and attested, that the testator was in right frame of mind to make the Will, but they have actually acted pursuant to the Will and have taken steps to implement the Will. Perusal of the documents filed with the affidavit in support of the caveat shows that one of the caveators Dr.Meherji Aspendiar Oshtory in fact signed the letter as executor of the Will.

5. Thus, it is clear that the caveators are not challenging the validity and legality of the Will and therefore, they are not entitled to maintain the caveat. The Notice of Motion is, therefore, granted in terms of prayer clause (a), excluding the bracketed portion. Office shall,now, proceed in accordance with law.

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